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THE PAST AND FUTURE OF THE FEDERAL RULES IN STATE COURTS

Carl Tobias*

One decade and a half ago, Professor John B. Oakley published a path-breaking, comprehensive assessment of the procedural systems prescribed by all fifty of the states and the District of Columbia, in which the scholar compared those procedural schemes at the state level with the Federal Rules of Civil Procedure.¹ This evaluation demonstrated that approximately two thirds of the jurisdictions premised their procedural approaches substantially on the federal model.² However, the analysis also showed that a disproportionate number of heavily-populated states employed procedures which departed from their federal counterparts, so that essentially nonfederal regimes of procedure governed sixty-two percent of the people in the United States.³ Moreover, Oakley's study ascertained that the "pace of state procedural reform to either replicate or substantially emulate the federal model of procedure" had slackened nearly to a halt between 1975 and 1985 after a quarter century in which there was an almost "constant rate of state-court replication of" the Federal Rules of Civil Procedure.⁴ This assessment of the Federal Rules in state courts proved to be especially valuable because a substantial number of proceduralists have essentially devoted little attention to this important area of modern civil process.⁵

Professor Oakley's new reprise significantly advances comprehension of the interaction between federal and state systems of civil procedure. Oakley thoroughly documents the dwindling impact of the Federal Rules of Civil Procedure "as avatars of procedural reform" and finds "[f]ederal procedure is less influential in state courts than at anytime in the past quarter-century."⁶ The author determines that many state procedural schemes fail to follow the federal

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¹ John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986).

² See *id.* at 1377-78, 1431; see also John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 Nev. L.J. 354 (2003).

³ See Oakley & Coon, *supra* note 1, at 1428-31; see also Oakley, *supra* note 2, at 358.

⁴ See Oakley, *supra* note 2, at 358; see also Oakley & Coon, *supra* note 1, at 1434.

⁵ For a valuable, recent exception to this general proposition, see Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595 (2002); see also Carl Tobias, *A Civil Discovery Dilemma for the Arizona Supreme Court*, 34 ARIZ. ST. L.J. 615 (2002).

⁶ See Oakley, *supra* note 2, at 355.

system and arguably "there are no longer any true replicas of the FRCP to be found among the procedural systems of the fifty states and the District of Columbia."⁷

Professor Oakley's substantial contribution to the *Nevada Law Journal* dispute resolution symposium neither accords much treatment to how or why the earlier uniformity between state and federal procedural regimes changed so dramatically over such a brief period nor proffers very many suggestions for the future. My response aspires primarily to scrutinize how federal-state consistency deteriorated and secondarily to consider what, if any, measures should be instituted to change the present condition of state civil procedure in the fifty jurisdictions comprising the United States.

I. THE DECLINE OF FEDERAL-STATE PROCEDURAL UNIFORMITY

Professor Oakley candidly acknowledges that his contribution to the dispute resolution symposium does "not . . . seek to investigate and evaluate the causes for the decline of state conformity to the federal model"⁸ However, the writer does "admit to a present belief that not all the 'newest' federal rules are 'the best,' and from this perspective it seems . . . more that the states have elected to abstain from experimenting with dubious 'new ways' of adjudicating civil actions than that they have chosen 'to return to . . . old ways' that they had previously renounced."⁹ Oakley elaborates on these propositions: "It is the Federal Rules that appear to have moved away from the states, rather than vice versa."¹⁰

The author's ruminations in the paragraph immediately above capture a number of comparatively important reasons for the decreasing consistency between the Federal Rules of Civil Procedure and the procedural systems that numerous jurisdictions in the United States have implemented. Nonetheless, Oakley's speculation warrants expansion, while important additional propositions apparently explain declining uniformity witnessed between the federal and state procedural spheres.

One critical phenomenon has been the propensity of the federal rule revision entities to amend substantial numbers of federal rules, some of which revisions may lack effectiveness, with too great frequency.¹¹ The large package of revisions that the Supreme Court promulgated in 1983 was symptomatic.¹² The set of amendments significantly changed numerous features of discovery only three years after the 1980 "tinkering" revisions ceded considerably greater

⁷ See *id.*

⁸ See *id.* at 359.

⁹ See *id.*; see also Oakley & Coon, *supra* note 1, at 1427.

¹⁰ See Oakley, *supra* note 2, at 359.

¹¹ Numerous observers, including Professor Oakley, have identified this phenomenon. See, e.g., Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 846-47 (1993); John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules*, 55 MONT. L. REV. 435 (1974).

¹² See Amendments to Federal Rules of Civil Procedure, 461 U.S. 1095 (1983). See generally Arthur Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility* (Federal Judicial Center 1984).

control over the pretrial process to federal district court judges through pretrial conferences and scheduling orders and authorized district judges to sanction lawyers who did not perform certain duties as officers of the court.¹³ The overuse, abuse, and satellite litigation, which numerous observers attributed to the 1983 amendment of Federal Rule 11 governing sanctions, prompted the United States Supreme Court's revision of that provision in 1993 as part of a substantial group of amendments that additionally reformed discovery.¹⁴ Perhaps most controversial was an alteration in Rule 26 to impose mandatory prediscovery, or automatic, disclosure.¹⁵ This requirement concomitantly authorized all ninety-four federal district courts to reject or modify the federal rule¹⁶ partly as an accommodation of ongoing experimentation with disclosure, discovery, and numerous other cost and delay reduction procedures under the Civil Justice Reform Act (CJRA) of 1990.¹⁷ Disclosure's highly controversial nature and the complication and confusion generated by nationwide experimentation with diverse expense and delay reduction measures, a significant number of which conflicted with applicable federal rules and legislation, prompted the rule revision entities to amend the provisions covering discovery once again in 2000.¹⁸ The most important of these recent modifications limited the scope of discovery as a general matter and the scope of automatic disclosure specifically, adopted a national disclosure rule and correspondingly prohibited local federal district court departures from that proviso, and imposed limitations on the number and length of depositions.¹⁹

In short, over the last two decades, the number of federal rule amendments has significantly increased, while the frequency of federal rule revision has accelerated. Each of the federal district courts has also prescribed and applied escalating numbers of local requirements, some of which strictures conflict with analogous federal rules and statutes.²⁰ Indeed, the 1990 Civil Justice

¹³ See sources cited *supra* note 12; see also Amendments to Federal Rules of Civil Procedure, 446 U.S. 995, 998-1000 (1980) (Powell, J., dissenting) (affording and criticizing the "tinkering" 1980 federal rules amendments).

¹⁴ See Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 401 (1993) [hereinafter 1993 Amendments]; see also Carl Tobias, *Improving the 1998 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1606-16 (1994). See generally Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475 (1991).

¹⁵ See 1993 Amendments, *supra* note 14, at 420-21. See generally Griffin B. Bell, Chilton Davis Varner, & Hugh Q. Gottschalk, *Automatic Disclosure in Discovery - The Rush to Reform*, 27 GA. L. REV. 1 (1993); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991).

¹⁶ See 1993 Amendments, *supra* note 14, at 421; see also Bell et al., *supra* note 15, at 35-39.

¹⁷ See Paul D. Carrington, *Learning From the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295 (1994); A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1582-83 (1991).

¹⁸ See Amendments to Federal Rules of Civil Procedure, reprinted in 192 F.R.D. 340 (2000) [hereinafter 2000 Amendments]. See generally Carl Tobias, *A Modest Reform for Federal Procedural Rulemaking*, 64 LAW & CONTEMP. PROBS 283 (Spring/Summer 2001).

¹⁹ See 2000 Amendments, *supra* note 18. See generally Carl Tobias, *The 2000 Federal Civil Rules Revisions*, 38 SAN DIEGO L. REV. 875 (2001).

²⁰ See, e.g., Walter W. Heiser, *A Critical Review of the Local Rules of the United States District Court for the Southern District of California*, 33 SAN DIEGO L. REV. 555, 557-64 (1996); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Diver-*

Reform Act seemingly authorized, and may well have encouraged, all ninety-four federal district courts to promulgate and to enforce additional local measures, growing numbers of which conflicted with the Federal Rules of Civil Procedure and federal legislation.²¹

These federal developments, particularly the large number and heightened pace of amendments, may have contributed to federal-state inconsistency. The developments discouraged states from including in their rules of civil procedure new federal revisions, some of which the jurisdictions might have found offered questionable efficacy. For example, numerous states which had amended their sanctioning provisions to include the 1983 revision in Federal Rule 11 did not adopt the 1993 amendment in Federal Rule 11.²² Moreover, the highly controversial nature of the 1993 revision in Federal Rule 26 to impose automatic disclosure apparently dissuaded many jurisdictions from instituting that change, while a number of states seemed to adopt a "wait and see" attitude, pending additional experimentation with the device in the federal system.²³ These approaches undertaken by the states were apparently vindicated, because the Supreme Court further amended Rule 26 to limit disclosure and proscribe local district court departures from the federal stricture during 2000, a date which was relatively soon after the controversial 1993 revision.²⁴

Professor Oakley concludes that "where once the ideal 'one procedure for state and federal courts' was a beacon for procedural reform, its light has dimmed to barely a flicker," even as he recognizes that "federal influence on state procedure remains substantial, and important."²⁵ Indeed, one of the consummate ironies is how numerous jurisdictions have replicated dynamics witnessed at the federal level in several critical ways. First, under state equivalents of Federal Rule of Civil Procedure 83, districts and trial judges in numerous jurisdictions have adopted local measures that conflict with state rules of civil procedure.²⁶ For example, the governing strictures, dockets' size and complexity, and local legal cultures differ substantially between districts in less densely populated counties and Clark County, Nevada (which includes Las Vegas), but even between that particular subdivision and Washoe County, Nevada (which includes Reno).²⁷ Second, in many jurisdictions, state legisla-

gence and Emerging Procedural Patterns, 137 U. PA. L. REV. 1999, 2016-20 (1989). See generally Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533 (2002).

²¹ See, e.g., Lauren K. Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994); Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547.

²² See, e.g., MONT. R. CIV. P. 11; NEV. R. CIV. P. 11.

²³ See Oakley, *supra* note 2, APPENDIX TABLE 2, at 386. See generally Mullenix, *supra* note 15.

²⁴ See *supra* notes 15, 18, 19, and accompanying text.

²⁵ See Oakley, *supra* note 2, at 383-84.

²⁶ See, e.g., AZ. R. CIV. P. 83; MONT. R. CIV. P. 83; NEV. R. CIV. P. 83. See generally Tobias, *supra* note 5. The districts located in the metropolitan subdivisions, but also in less populated areas, of these three states have adopted numerous local procedures, some of which conflict with or repeat state rules of civil procedure.

²⁷ The caseload per judge, the governing local procedures, and the pace of civil litigation differ significantly in Clark and Washoe Counties. See Annual Report of the Nevada Judiciary, Fiscal Year 2000-01 (Supreme Court of Nev. 2001) (on file with author).

tion in substantive areas of law, such as medical malpractice and product liability, and in the field of civil justice reform, prescribes measures that conflict with state rules of civil procedure.²⁸ For instance, the medical malpractice reform statute recently passed by the Nevada Legislature includes a sanctioning provision which deviates from the analogous state rule of civil procedure 11.²⁹

II. SUGGESTIONS FOR THE FUTURE

The lofty ideal of "one procedure for state and federal courts" may always have been basically that: an admirable, but essentially unattainable, goal. Moreover, it is difficult to be particularly sanguine about the prospects for remedying federal-state disuniformity, although certain of inconsistency's most detrimental features may be amenable to amelioration.

The federal rule revisors have instituted one important effort to improve the increasing disuniformity that plagues the national system. The 2000 amendments retracted authority for federal district court adoption of local measures that depart from the federal rules.³⁰ This is a helpful initial step, although considerably more remains to be achieved before inconsistency in the federal system will be reduced, much less eliminated. For example, the Judicial Conference, the Circuit Judicial Councils, and the district courts should implement their duties – imposed under the 1988 Judicial Improvements and Access to Justice Act and various federal rules – to review local measures and abolish or modify those deemed to be in conflict with federal rules or statutes.³¹ The 1990 Civil Justice Reform Act essentially discontinued effectuation of these obligations.³² However, the expiration of that statute in 2000 means the entities should promptly implement the rule review responsibilities.³³ Until the national system reattains much greater uniformity, state civil procedure will probably not become more consistent with the federal regime, and its condition may even deteriorate.

Should the federal scheme achieve increased uniformity, this development might encourage state attempts to enhance consistency. Nonetheless, several obstacles could impede efforts to increase uniformity in the fifty jurisdictions. Numerous states may not possess sufficient resources to decrease inconsistency, but more jurisdictions might lack the requisite will, in part because there apparently is no strong constituency which supports this reform. Substantial incentives for maintaining the status quo or departing even further from uniformity also exist. Experience in the federal arena clearly suggests that judges,

²⁸ The idea about civil justice reform should not be surprising because the federal reform was premised substantially on state reforms. See Tobias, *supra* note 21, at 564.

²⁹ Compare A.B. 1 § 16 (2002) with NEV. R. CIV. P. 11. See generally Carl Tobias, *Procedural Provisions in Nevada Medical Malpractice Reform*, 3 NEV. L.J. 406 (2003).

³⁰ See 2000 Amendments, *supra* note 18, at 384-85, 391.

³¹ See 28 U.S.C. §§ 332 (d)(4), 2071 (a) (1994); FED. R. APP. P. 47; FED. R. BANKR. P. 9029; FED. R. CIV. P. 83; FED. R. CRIM. P. 57. See generally Tobias, *supra* note 20.

³² See 28 U.S.C. §§ 471-78; see also Tobias, *supra* note 14, at 1605. See generally Robel, *supra* note 21.

³³ See Pub. L. No. 106-518, § 206, 114 Stat. 2411, 2414 (2000). See generally Carl Tobias, *The Expiration of the Civil Justice Reform Act of 1990*, 59 WASH. & LEE L. REV. 541 (2002).

attorneys, and parties favor local procedure with which they are familiar and that often affords local interests strategic and additional benefits.³⁴

Despite these hurdles, jurisdictions should carefully evaluate whether mounting disuniformity is advisable. For instance, the growing inconsistency may increase the expense of civil litigation. If states ascertain that greater uniformity is warranted, the jurisdictions should review state civil procedures for consistency with the federal rules and adopt the federal analogues that have proven effective. States might correspondingly implement local procedural review which resembles that in the federal system.

III. CONCLUSION

Professor John Oakley's contribution to the dispute resolution symposium significantly improves comprehension of the relationship between contemporary federal and state regimes of civil procedure. The author demonstrates that most jurisdictions have deviated from the federal system over the last decade and a half. My response attempts to elucidate why this departure has occurred and how states might rectify or ameliorate the circumstances.

³⁴ See, e.g., Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992); Robel, *supra* note 21.